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No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1931

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 773

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Old Colony Railroad Company, Boston & Providence Railroad Corporation (Massachusetts), Boston & Providence Railroad Corporation (Rhode Island), Providence, Warren & Bristol Railroad Company, The Harlem River and Port Chester Railroad Company, Holyoke & Westfield Railroad Company, Providence & Worcester Railroad Company, Chatham Railroad Company, and Norwich & Worcester Railroad Company

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PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

May it Please the Court:

The petitioner, Interstate Commerce Commission, respectfully prays that a writ of certiorari issue in accordance with the provisions of subsection (a) of section 240 of the Judicial Code, as

amended and reenacted by the Act of February 13, 1925 (c. 229, 43 Stat. 938, 28 U. S. C. A., §347), to review a judgment of the Court of Appeals of the District of Columbia, entered January 18, 1932. (R. 655.) The said judgment reversed a judgment of the Supreme Court of the District of Columbia which had dismissed a petition for writ of mandamus to compel the Commission to find and include in its reported valuation of the respondent's property under Sec. 19a of the Interstate Commerce Act the value of the respondent's rights to participate in the use of terminal facilities in the cities of New York and Boston owned and operated by other common carriers. (R. 450.)

The petition respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

The controversy had its inception in an investigation instituted by the Commission under Sec. 19a of the Interstate Commerce Act (U. S. C., Title 49, Sec. 19a) to find and report the value as of June 30, 1915, of the property owned or used by The New York, New Haven & Hartford Railroad Company and its several lessors and subsidiaries, the other respondents herein, all hereinafter collectively called the New Haven.

The New Haven operates certain owned and leased lines of railroad in Massachusetts, Rhode Island, Connecticut, and New York. (R. 434.) Its

tracks enter the State of New York from Connecticut at or near Port Chester, and at Woodlawn connect with the tracks of the New York and Harlem Railroad Company, hereinafter called the Harlem, now operated under lease by the New York Central Railroad System, hereinafter called the Central, which also owns a majority of the Harlem's stock. (R. 476.) From Woodlawn south to and into Grand Central Station, a distance of about 12 miles, the New Haven passenger trains operate over the Harlem's tracks and the New Haven and the Central use the station in common, all pursuant to two contracts hereinafter mentioned. (R. 434–437.) At Boston, Massachusetts, the New Haven's tracks connect with those of the Boston Terminal Company, hereinafter called the Boston Terminal, and from the point of connection to and into the South Station at Boston the New Haven passenger trains operate over the Boston Terminal's tracks, and the New Haven and the Central, as lessee of the Boston and Albany, participate in the use of the Boston Terminal's South Station pursuant to Chap. 516, Laws of Massachusetts, 1896. (R. 6.)

The Grand Central Terminal and its approaches in New York and the South Station in Boston belong to and are operated by other common carriers to whom the Commission inventoried and valued them as "owned and used." (R. 425, 428–429.)

The proceeding before the Commission.—At the valuation hearing the New Haven presented in evidence certain charters, contracts, agreements, and

legislative enactments relating to its rights to use these passenger terminals and contended in each instance that such rights of use were not ordinary trackage rights, but estates in the property which should be valued under the Act.

The New York Terminal.—The New Haven's right to use the Harlem's tracks is held under an "Agreement and Contract of Transportation" (R. 520) entered into between the Harlem and a predecessor of the New Haven on March 17, 1848, by which the Harlem granted to the New Haven the right—

> to run their trains, engines, and cars for the transportation of passengers, mails, expresses, freight, etc., over the track or tracks of the road of the New York and Harlem Railroad Company from the point of junction aforesaid to and into the city of New York, * * * (R. 435, 520.)

Under this agreement the New Haven was to furnish its own haulage and to pay the Harlem "as full compensation for the use and occupation of their track or tracks as aforesaid a certain sum for each passenger transported," and a portion of the tariff rates received for the transportation of express and mail matters. (R. 521–522.) The Harlem was to "keep its road from the aforesaid point of junction to the termination of the part thereof to be used by the New York and New Haven Railroad Company in good and sufficient repair." (R. 524.) The contract was to continue in force

during the terms of their charters, respectively, and for all renewals thereof, and contained a provision for the adjustment of compensation every five years by agreement, or, in event of failure to agree, by arbitration. (R. 524.)

By Chapter 143 of the Laws of 1848 the New York Legislature authorized the New Haven to enter upon and run its cars and engines over the road of the Harlem Company from the point of junction into the City of New York, upon such terms and to such point "as has been or may hereafter be agreed upon by and between said Companies." (R. 436, 529–530.)

Pursuant to the statute and agreement, the New Haven connected its tracks with those of the Harlem, and ever since has operated its trains over them into the City of New York. (R. 436.)

On April 1, 1873, the Harlem road leased all of its steam railroad property to the Central for a term of 401 years, subject to the provisions of the contract between the Harlem and the New Haven, which was specifically assigned to the Central. This lease has been in full force and effect down to the present time. (R. 436.)

By agreement dated July 24, 1907, between the Harlem, the Central, and the New Haven, provision was made for certain additions and changes in the New York terminal facilities required by Chapter 425 of the Laws of 1903 of New York (R. 582), and for the construction of the present

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Grand Central Station. The Central agreed at its sole expense to acquire all lands, make the changes, and construct the railroad terminal, and acting for itself and the Harlem, leased to the New Haven, during the term of the New Haven's charter and all renewals thereof—

> the use, in common with the Central Company, subject to all the provisions of this agreement, of the said Railroad Terminal for the accommodation of the traffic of the New Haven Company, other than freight traffic. (R. 595.)

with the proviso that the New Haven's right to the use of the terminal should in no event exceed 50% of its maximum capacity. (R. 437, 595.) As compensation the New Haven was to pay to the Central that proportion of four and one quarter per cent interest on the cost of construction and of the annual expenses for maintenance and operation "which the use of the Railroad Terminal by the New Haven Company bears to the entire use thereof," determined on the basis of "wheelage." (R. 595–597.)

The New Haven contributed no part of the cost of the terminal nor of the four-tracking of the Harlem's main line from Woodlawn to the Terminal. (R. 437.)

The Boston Terminal.—By act of June 9, 1896, the Massachusetts Legislature incorporated the Boston Terminal Company for the purpose of constructing and operating a union passenger station

in the City of Boston, and to provide adequate terminal facilities for several railroad companies entering the city, and for accommodation of the public. (R. 616.) The five several railroad companies were authorized to subscribe for the capital stock of the Terminal Company, which was fixed at $500,000, in equal amounts. The management of the station and its approaches was to be vested in a board of five trustees, one to be appointed by each of the railroad companies from its board of directors. The Terminal Company was authorized to raise money by the issuance of bonds secured by mortgages or pledges of its property. (R. 617.)

By Section 9 of the Act, it was provided that the said railroad companies should, upon its completion, use the station and the approaches for all their terminal passenger business in Boston, instead of the terminals then used by them. (R. 620.)

Other provisions of the Act required the railroads to pay to the Terminal Company, in proportion to the use made, such amounts as should be necessary to pay the expenses of the Terminal Company's corporate administration and the maintenance and operation of the station and facilities connected therewith, including insurance, repairs, taxes and assessments, interest upon its bonds, and a dividend not to exceed 4% per annum upon its capital stock. The proportion of use by the several companies was to be fixed by agreement between them or, in case of failure to agree, by the Massachusetts Board of

Railway Commissioners, and payment made by the companies should be deemed "a part of their operating expenses." (R. 621.)

Pursuant to this statute, the Boston Terminal Company was incorporated, each of the five companies subscribed to its capital stock, and the terminal known as the South Station and its approaches were constructed by the Boston Terminal Company, which has ever since operated the property.

The New Haven, having acquired the property of the New England Company through merger and leased the property of the Boston and Providence and Old Colony Companies, is now in control of 80% of the capital stock of the Terminal Company, and the Central as lessee of the Boston and Albany controls the balance. (R. 439.)

The issue of the nature of the New Haven's rights under the contracts and statutory enactments, together with many others raised by the New Haven, was submitted to the Commission on June 15, 1926.

The Commission's decision.—After considering the evidence the Commission reported its valuation for rate-making purposes of the respondents' property in a report and order dated November 13, 1929. (30 I. C. C. Val. Rep. 1–291.) The full text appears in the record at pages 24–388.

In this report and order the Commission considers and discusses the matter of the New Haven's rights (R. 60–67) and holds adversely to the New Haven's contention (R. 66–67, 76).

In respect of all the New York property the Commission recites in substance that the New Haven has no investment therein (R. 63); that the property is maintained solely at the expense of the Central, which owns and uses it (R. 64); and that the contracts contain no provision for acquiring a part ownership or an interest in the fee (R. 64, 66).

It further recites that Sec. 15a provides that values found under Sec. 19a shall be deemed to be the values for rate-making purposes and in substance requires that rental payments for trackage rights, or other joint-facility rents, shall be deducted as operating expenses in computing allowable net railway operating income; and that under such provisions to value the trackage rights for the purposes of rate-making would result in duplication.

The Commission noted that only the magnitude distinguished the New Haven's rights from many similar rights of carriers to enjoy the use of other carrier's property along with the owners (R. 65) and it held that for the purpose of ascertaining a value for rate-making purposes, no specific value should be reported for these commercially valuable contract rights (R. 66–67). As to the property of the Boston Terminal Company, the Commission recites that it has heretofore classified and valued all of that company's property as owned and used by it as a common carrier in the valuation of the *Boston Terminal Company,* 103 I. C. C. 707, and it declines to assign any specific value to the rights

of the New Haven therein. (R. 67.) The Commission in its order designates the rights collectively as "important trackage rights." (R. 76.)

For the purpose of explaining the methods of valuation employed, the order made reference to and incorporated therein that portion of the Commission's decision in its first valuation case, *Texas Midland Railroad,* 75 I. C. C. 1, 108–182 (R. 127), designated as Appendix 3, wherein such methods were determined and stated. The parts of that decision relating to trackage rights appear in the record at pages 388–396.

The proceedings in the Supreme Court of the District.—The New Haven, alleging that its rights constitute estates in the terminal properties, that the Commission is without authority to limit its finding to a value for rate making purposes, and that the Commission's refusal to value the rights disregards a mandatory duty under Sec. 19a, sought a writ of mandamus from the Supreme Court of the District of Columbia. (R. 1–24.)

The Commission's answer (R. 404–423) sets out that it had fully considered the New Haven's contention and decided adversely thereto; that it had fully complied with the statute in valuing all of the physical property mentioned in the petition to the owning carriers and making appropriate reference to the "rights" under its rules and methods; that the Act contained no specific instructions as to the valuation of trackage rights; that it had to

exercise discretion to interpret the Act; that it interprets the Act as not requiring the valuation of such rights, alleged to be merely licenses dependent upon rental as shown by the New Haven's sworn reports to the Commission (R. 405–419). The answer also alleged the failure of the New Haven's petition to state a cause of action for mandamus, reciting that said petition sought to use mandamus to annul the final valuation and reverse the decision and to direct the Commission to exercise its discretion in a particular way to interpret the Act so as to apportion to the New Haven part of the value found for the property of third parties not parties to the case by recognizing the New Haven's alleged title in the property. (R. 420–422.)

The case was submitted in that Court upon the petition, the rule to show cause, the answer and further pleadings, and upon oral and documentary evidence offered at the trial, which occurred on February 12, 1931.

The opinion of the Supreme Court.—The Court, in a memorandum opinion by Chief Justice Alfred A. Wheat filed April 2, 1931, refused the writ (not reported, but included in record pp. 434–449).

This opinion held that the Commission's method of valuation, adopted in the *Texas Midland Railroad* case and steadfastly followed in more than a thousand valuations since reported, was so reasonable and so consistent with the purpose of the Act that any other would lead to unjust and unreason-

able results (R. 442); that the New Haven's rights were merely trackage or terminal rights under *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564 (R. 445, 447); and that "the Commission did not err in declining to value the rights of the relator" (R. 449).

The opinion of the Court of Appeals.—Upon appeal to the Court of Appeals of the District of Columbia the judgment was reversed by judgment entered by concurrence of four justices, one not sitting, on January 18, 1932. The accompanying opinion by Mr. Justice Van Orsdel held, among other things, that the case of *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564, relied upon by the Supreme Court of the District of Columbia, had little or no bearing on the issues herein presented because the contract there "granted merely trackage rights" (R. 647); that the New Haven owns and uses a perpetual easement which coupled with a franchise constitutes a dominant servitude in the New York Terminal approaches (R. 643); that it owns and uses a base fee in the undivided half of the Grand Central Terminal (R. 646); that the Boston Terminal Company is little more than a holding company and that the New Haven is, with two of its subsidiaries and another railroad, one of the "real owners" of the Boston property (R. 648); that the value directed to be found by Sec. 19a is not limited to a value for rate-making purposes, which is stated to be

only one of a number of objects for which the Commission's valuations are to be *prima facie* evidence (R. 651); that the Valuation Act directly and expressly requires the valuation of all property whether physical or incorporeal, including "the joint use of property owned by other carriers" (R. 651); that the Commission's failure to comply therewith is not an exercise of discretion but a refusal to act (R. 654); that this case is distinguishable from its prior holding in *United States ex rel. Kansas City Southern Ry. Co. et al.* v. *Interstate Commerce Commission,* 6 Fed. (2d) 692 (R. 652); and that under the decision of this Court in *Kansas City So. Ry.* v. *Int. Com. Comm.,* 252 U. S. 178, mandamus will lie to compel the Commission to assume jurisdiction of the specific duty of valuing these "specific well-defined portions of the road which they refused to value" (R. 653–654).

THE QUESTIONS PRESENTED

This petition presents for a decision by this Honorable Court the following questions:

1. Whether in an action for mandamus the Courts of the District of Columbia can review the Commission's classification of a carrier's rights as important trackage rights and determine that they constitute estates in the physical properties of other carriers not parties to the action?

2. Whether Sec. 19a of the Interstate Commerce Act so explicitly requires the Commission to ascertain and report a specific value for all incorporeal

property, including trackage rights in property owned and used by other carriers, that the Commission is without discretion in the matter and may be compelled by mandamus to specifically value such use of property?

3. Whether in its report of its valuation investigation under the Act, the Commission may limit its specific findings of a single-sum value to a value for rate-making purposes?

4. Whether the New Haven's rights to participate in the use of tracks and terminals belonging to and operated by other carriers, upon payment of a compensation for the use enjoyed, constitute estates in the property and not ordinary trackage rights?

B

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reasons relied on by the petitioner for the granting of a writ of certiorari and upon which the petitioner believes that the writ ought to be granted are as follows:

General Importance

The case involves a question of general importance in that—

(1) The Commission's valuations of all the steam railroads of the country involving more than 1,000 valuation decisions have been made upon the basis of the Commission's interpretation of the Statute now held to be erroneous by the Court of

Appeals, and the decision of that Court, if not reversed, will require the revaluation of all these carriers.

(2) The decision requires that property once fully valued to the carrier owning and using the same must receive a further valuation in the report of the carrier having rights of use therein, and thereby results in a duplication of values which must be used for rate-making purposes.

(3) We read the decision as in conflict with the prior decision of the same Court in *United States ex rel. Kansas City Southern Ry. Co. et al.* v. *Interstate Commerce Commission,* 6 Fed. (2d) 692, and also, as to Boston Terminal, as in conflict with a decision of the United States Circuit Court of Appeals (1st Circuit) in *Boston Terminal Co.* v. *Gill,* 246 Fed. 664.

Construction of Federal Statute

The question of the duty of the Commission in respect to reporting a single-sum value and its refusal to specifically value trackage rights involves the construction of an important statute of the United States which has not been but should be settled by this Court.

(1) We read the decision of this Court in *Kansas City So. Ry.* v. *Int. Com. Comm.,* 252 U. S. 178, held to be decisive by the Court of Appeals, as inapplicable.

(2) A final valuation report under Sec. 19a being only *prima facie* evidence of value and there being

a complete remedy for correction of errors therein when such report is used in evidence, may not, prior to its use, be subjected to court review for erroneous conclusions, either by mandamus or by proceedings in equity. *United States* v. *Los Angeles R. R.*, 273 U. S. 299.

Erroneous Construction of Applicable Decision

The decision of the Court of Appeals of the District of Columbia in respect of the nature of the New Haven's rights rests upon an erroneous construction of the applicable decision of this court in *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564.

BRIEF IN SUPPORT OF PETITION

I

THE OPINIONS OF THE COURTS BELOW

The memorandum opinion rendered by the Supreme Court of the District of Columbia is unreported, but appears on pages 434–449 of the record. The opinion of the Court of Appeals of the District of Columbia rendered January 18, 1932, has not been officially reported, but will be found on pages 641–655 of the record. The opinion and order of the Commission is reported as 30 I. C. C. Val. Rep. 1 and will be found at pages 24–388 of the record.

II

JURISDICTION

The order of the Supreme Court of the District of Columbia dismissing the petition for a writ of mandamus was entered April 3, 1931. From this order an appeal was prosecuted to the Court of Appeals of the District of Columbia (R. 450–487), which, on January 18, 1932, made its order and handed down its opinion reversing the judgment of the said lower court (R. 655).

The jurisdiction of this Court is invoked under subsection (a) of Section 240 of the Judicial Code as amended and reenacted by Act of February 13, 1925 (c. 229, 43 Stat. 938, 28 U. S. C. A. § 347).

III

STATEMENT OF THE CASE

The Court is respectfully referred to the statement of the case hereinbefore contained under heading "A" in the petition for the writ of certiorari.

IV

THE STATUTE

The pertinent provisions of Sec. 19a of the Act (Sec. 19a, Title 49, U. S. C.) are as follows:

> SEC. 19a (a) That the Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. * * * The Commission shall make an inventory

which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property as nearly as practicable in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

(b) First. In such investigation said Commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The Commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of same, together with an analysis of the methods of valuation employed.

* * * * *

(c) Except as herein otherwise provided, the Commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

(d) Such investigation shall be commenced within sixty days after approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(e) * * * all rules and regulations made by the Commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. * * *

* * * * *

(h) Whenever the Commission shall have completed the tentative valuation of the

property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the Commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

(i) If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the Commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the en-

forcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

V

ARGUMENT

A

1. The case involves a question of general importance in that the commission's valuations of all the steam railroads of the country, involving more than 1,000 valuations, have been made upon the basis of the commission's interpretation of the statute now held to be erroneous by the Court of Appeals, and the decision of that court, if not reversed, will require the revaluation of all these carriers

The enactment by Congress on March 1, 1913, of what is now known as the valuation section of the Interstate Commerce Act (c. 92, 37 Stat. 701, Title 49, U. S. C. Sec. 19a) placed upon the Commission the stupendous task of inventorying and valuing "all the property owned or used by every common carrier" subject to the Act. The legislation had its origin partly in the wide public belief that a fair valuation of the railroad properties would indicate a large overcapitalization and justify rate reductions. But such legislation had been repeatedly urged upon Congress by the Commission

upon the ground that in administering the rate-making provisions of the Act it was seriously handicapped by having no means of testing the accuracy of estimates of value presented by interested carriers in rate hearings.

For several years after the enactment the Commission was engaged in the taking of field inventories of physical property and it was not until July 31, 1918, that it published its first final report of the valuation of a carrier. *Texas Midland Railroad,* 75 I. C. C. 1. Most of the many valuation questions which the Commission had to decide at the inception of its work were involved in this case, and the Commission sought to make of the decision as far as practicable a complete statement of the methods and principles adopted by it for the valuation of railroads generally. For this purpose it prepared a "statement of methods" which it incorporated in the Texas Midland report as "Appendix 3," and this appendix, by reference thereto, has been made a part of all subsequent valuations.

Having obtained complete inventories of the property owned or used by all carriers, one of the first and most important questions presented was to determine the proper methods of reporting the value of property owned by one carrier, but used by others under lease or the various forms of contracts for trackage rights commonly found to exist. In its appendix to the Texas Midland case (p. 122–123; R. 388–389) the Commission stated:

> Ordinarily carrier property is inventoried in the name of the owner; that is, the details are shown in the inventory of the owner and not elsewhere. In case of jointly owned property the details would appear in the inventory of each owner.
>
> Where property is owned by one carrier and exclusively used by another carrier the details would appear in the inventory of the owner, but the total amount would be shown in the inventory of the user as property used by that carrier.
>
> * * * * *
>
> It often happens that a carrier which owns and uses its property gives to some other carrier a qualified use in that property in common with itself. Such use is generally denominated a trackage right, and is the right to use the tracks of the owner for a compensation usually varying with the extent of the use.

In the absence of what is deemed to be any specific direction in the Act for the treatment to be accorded "trackage rights," it announced a method which it thought to be reasonable and to meet the requirements of the Act:

> Where property is owned by a common carrier and is used by it jointly with another carrier or carriers for common-carrier purposes, the property is included in detail in the inventory of the owning carrier and reference is made to the use by the other carrier or carriers. The extent and terms

> of the use appear also in the inventory of the using carrier or carriers.
>
> It has been our endeavor to adopt a method with respect to this class of property which will permit of reporting the three cost values for all property used for common-carrier purposes without duplication. When it is borne in mind that many railroads are not operated exclusively by their owners, but that certain portions thereof are used by one or more carriers by virtue of trackage rights, etc., it is apparent that duplication of values for such jointly used property will result unless a proper course of procedure is pursued. The necessity of securing reproduction new and reproduction less depreciation values without duplication is manifest, since these values must necessarily be considered as factors entering into the determination of an ultimate value of railroad property (p. 21, R. 392).

To the contention that the use should be valued, and in explanation of its rejection of a value for the right of use, the Commission said (pp. 23–24, R. 395, 396):

> It is a sufficient answer to this contention to state it is now universally accepted that it is the fair value of the property used by the public service corporation in serving the public which is to govern in fixing rates. *San Diego Land Co.* v. *National City,* 174 U. S. 739. This being true, the value of that property can not be increased or diminished

by contracts or other arrangements between the carriers themselves. In the absence of an improper payment as rental the public is not concerned with the acts of carriers between themselves. The law requires the ascertainment of values for property owned or used, but not the value of the use.

* * * * *

When the valuation work has been completed for all the railroads in the United States, the Commission, the Congress, and the public will be informed with respect to every piece of property used in serving the public, with the single exception of that insignificant portion which is privately owned and partially used by common carriers. The inventories of the individual carriers will contain the cost values in detail with respect to property owned; the cost values in detail for property exclusively used by them but owned by a noncarrier; total cost values for property exclusively used by them but owned by a common carrier; a description of the terms and use of jointly used property of others with a reference to the report of the owning carrier for details in regard thereto; and a description of the terms and use of jointly used property owned by them with a reference to the reports of the using carrier or carriers for details in regard thereto. All the property used in serving the public will be inventoried and valued, and will be inventoried and valued *once and only once.* There will be and should be no duplications. (Italics ours.)

In respect to its conclusion the Commission stated:

> It is believed that the method adopted fully complies with the statute (p. 124, R. 390).

The method announced above has been uniformly followed by the Commission since 1918 and was employed in the instant case. The valuation of the steam railroads of the United States, comprising more than 1,000 valuation decisions, has been practically completed upon this method and interpretation of the statute.

Most operating carriers, to greater or less extent, have rights of use in property owned and used by other common carriers. The principles governing the classification for valuation purposes of such property must be the same whether the property involved be of major or minor size. The decision of the Court of Appeals, holding that the Act explicitly commands the Commission to specifically value the rights of use of the New Haven in property held and used by other carriers, will, if not reversed, necessitate the remaking of most, if not all, of the Commission's valuations. This can only be done at great expense to the public and with consequent delay in the uses of such valuations.

Sec. 19a of the Act provides that valuations made under it shall be *prima facie* evidence of the value of the property in all proceedings under the Act and in judicial proceedings for the enforcement or setting aside of orders of the Commission. At the

date of the passage of the Valuation Act rate making was the only purpose for which the Commission had occasion to use a value of the properties used by a carrier for common-carrier purposes. From that date reports have been made to Congress annually informing it of the valuations made in compliance with its direction. By the Transportation Act of 1920 (c. 91, 41 Stat. 456) Congress made amendments to the Interstate Commerce Act, the most important of which were the rate making and recapture provisions contained in Sec. 422 (41 Stat. 488), now known as Sec. 15a of the Act (U. S. C., Title 49, Sec. 15a). In this section Congress again dealt with the subject of valuation and specified purposes for which valuations made under Sec. 19a should be used. In par. (2) it provided:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

In par. (4) it provided:

> For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

This positive direction to the Commission in determining aggregate values to "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes," coupled with the express declaration immediately following that values of individual carriers once *finally ascertained* under Sec. 19a *shall be deemed to be* the values thereof for the purposes of computing aggregate value, amounted to a legislative direction to the Commission that values should there-

after be determined in such manner and upon consideration of such elements that they might properly be used for rate-making purposes.

In its fifth valuation decision wherein it announced for the first time a final single-sum value of the property of any carrier, the Commission noted the above requirements of the Act (*San Pedro, Los Angeles & Salt Lake R. R. Co.*, decided June 7, 1923, 75 I. C. C. 463, 504–507), declared that the value of the property of a common carrier could not be said to be the same for all purposes, irrespective of the use to be made of that value, and concluded that the final single-sum value which it should ascertain and report is the value for rate-making purposes.

In every subsequent valuation decision, including that of the New Haven, the Commission has stated the single-sum values found to be those for rate-making purposes. In respect to the New Haven's rights to participate in the use of property held and operated by other carriers, it stated that such rights should not be valued for rate-making purposes.

In its decision the Court of Appeals has stated: "We must not be understood as holding that the valuation of the New Haven property fixed by the Commission is not a proper valuation for rate-making purposes." (R. 651.) But it held that the valuation required by the statute could not be subjected to the limitation of a value for rate-mak-

ing purposes, and that the Commission was required to include the value of the New Haven's rights. The effect of the decision, as read by us, is to require that valuations made for other than rate-making purposes shall be used in establishing rates.

In view of the foregoing considerations, the question in respect to the matters said to be explicitly required by the Act is a matter of great general importance.

2. The case involves a question of general importance in that to require that property once fully valued to the carrier owning and using the same must receive a further valuation in the report of the carrier having rights of use therein results in a duplication of values which must be used for rate-making purposes

All of the property comprising the New York and Boston terminals in question has been inventoried and valued to the New York Central and its controlled subsidiary the Harlem, or to the Boston Terminal Company. These companies hold the record title to the terminal properties, have issued the securities for and made the entire investment covering their purchase or construction, have possession of and control and operate the same. As the owners they are entitled to and receive the rentals paid by the New Haven for its rights to operate over the property and such revenues become part of their net railway operating incomes. The extent of the New Haven's rights of use are shown in the reports of the valuation of each carrier. In re-

porting the single-sum values for the Central and the Boston Terminal, as well as the New Haven, the Commission recites that it has given consideration to the intangible elements of value which inhere in the physical properties, including appreciation, going concern, etc. (R. 73, 87.) Having done this, the Commission thought that it had complied with the requirements of the statute and valued once "all the property."

Nevertheless, the Court holds that the Commission assumed jurisdiction to value only a part of the New Haven's property "segregating specific well-defined portions of the road," to wit, the parts of the New York and Boston terminals over which the New Haven runs its trains, "which they refuse to value." (R. 654.)

If such property, once fully valued to the carriers which own and use the same, must also be included in the inventories and valuations of carriers which operate thereover upon the payment of rental, as we read the decision to require, a duplication of values results.

Two railroads whose properties have been fully valued can not, it would seem, by the device of entering into contracts for the use of each other's property thereby create *additional* property which must receive further valuation. Such contract arrangements undoubtedly create new rights and obligations between the contracting parties, but they call for no investment of money and do not add

anything to the *property* which is devoted to public use.

The decision would, as we read it, not only result in a duplication of property values upon which the public must pay a return in rates, but it results in a duplication of the *return* on property held.

By the express requirement of par. (1) of Sec. 15a (U. S. C., Title 49, Sec. 15a), rentals paid for use of joint facilities are deducted by the paying carrier in computing net railway operating income, just as all operating expenses are deducted. A carrier is unquestionably entitled to earn from rates an amount sufficient to pay all operating expenses and in addition a fair return on the value of its property; but to allow it to receive a return on the value of another carrier's property and, at the same time, to charge to operating expenses rentals for the use of that property results in the public paying and such carrier receiving a double return on that "property." This would reward with a double return on property the carrier which uses the property of others under trackage rights and by comparison penalize with a single return the carrier which acquires the use of property through investment in the ownership thereof.

The rentals paid by the New Haven are typical examples of "joint facility rents" as defined in the Commission's classification of accounts, as referred to in Sec. 15a and as consistently reported and treated by the New Haven itself.

The foregoing is submitted as indicating that the Court's decision has far reaching consequences in respect to proper methods of valuation and regulation of common carriers and that the questions involved are of great general importance.

3. The case involves a question of general importance in that we read the decision of the Court of Appeals as in conflict with its prior decision in *United States ex rel. Kansas City Southern Ry. Co. et al.* v. *Interstate Commerce Comm.*, 6 Fed. (2d) 692, and as to Boston Terminal, as in conflict with a decision of the United States Circuit Court of Appeals in *Boston Terminal Co.* v. *Gill*, 246 Fed. 664

The decision of the Court of Appeals of the District of Columbia in *United States ex rel. Kansas City Southern Ry. Co. et al.* v. *Interstate Commerce Commission*, 55 App. D. C. 389, 6 Fed. (2d) 692 (June 1, 1925), resulted from an action for mandamus brought to require the Commission to perform the alleged plain and explicit ministerial duty under Sec. 19a of ascertaining and reporting "the value of all the property owned or used by every common carrier." The petition alleged that the Commission had held that it would separately value the property of the Kansas City Terminal Railway Company—a Missouri corporation owning terminal properties in Kansas City—and that it had failed and refused to include in the inventory or single-sum value of the petitioner's property anything to represent its interest or right of use therein. It alleged that the petitioner with eleven

other railroads owned all the stock of the Terminal Company and had entered into contracts to use its property for a period of 200 years upon the payment of rental sufficient to pay operating and maintenance expenses and interest on its securities, the entire rental to be apportioned among the several using carriers in proportion to the extent to which each made use of the facilities. It stated:

> The Terminal Company is, in substance, a joint agency of each of the twelve constituent lines in the performance of its freight and passenger service in Kansas City, Missouri. Each is the equitable owner of one-twelfth of the terminal property.

The case being heard upon a motion to dismiss the facts stated in the petition, for the purpose of the decision, were taken as true. The Supreme Court of the District of Columbia granted the motion to dismiss and on appeal the Court of Appeals, affirming the decision, said (p. 693):

> * * * The appellants, however, contend that the Commission failed to obey the mandate of the act in many particulars, among them the following, to wit: That it failed to ascertain and report the economic or exchange value of the common carrier property, *but instead reported a so-called rate-making value thereof;* * * *.
>
> Accordingly they prayed for a writ of mandamus, directing and requiring the Commission (a) to investigate, ascertain, and report the true, economic value of all

said properties; * * * (e) to ascertain and report the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and the value of appellants' *right and interest in certain specified properties, to wit, the Kansas City Terminal Railway Company,* * * *.

The reports of the Commission are brought by reference into the record. They disclose that each of these objections, *including the reference to properties alleged to have been omitted,* was presented to the Commission by the appellants, and was fully investigated, considered, and passed upon by it.

* * * * *

It is true that the Commission did not base its valuation upon the earning capacity of the carrier properties to the extent claimed by the appellants, nor upon the market value of their outstanding securities. Nevertheless it is manifest that the Commission fully assumed and exercised the authority or jurisdiction imposed upon it by the act, and that the real complaint of the appellants is not that the Commission refused to consider the points in question, but that it considered them and thereupon decided them erroneously. The real relief sought by the appellants, accordingly, is that the valuation reported by the Commission be set aside, and other valuations ordered. This clearly brings the case within the well-established rule that the action of mandamus can not be used as a substitute

> for an appeal, nor as a writ of error. (Italics ours.) (Certiorari denied, 269 U. S. 570.)

We read the foregoing decision as plainly holding that Sec. 19a of the Act contains no provision which could be construed as explicitly commanding the Commission to find a value other than for rate-making purposes, nor any explicitly directing the Commission to inventory or value rights of use held by one carrier in property owned and used by another common carrier. The Court of Appeals distinguishes its former decision with the statement: "There the commission valued all the property of the carrier; here it refused to value certain of the property." (R. 652.)

Inasmuch as the Kansas City Southern's rights to operate its trains into the Kansas City terminal were in essential respects similar to the rights of the New Haven to operate its trains into the New York and Boston terminals, and inasmuch as the Commission pursued the same methods of valuation in both instances, we read the lower Court's decision in the present case as being in conflict with its former decision.

The decision of the Court of Appeals is also read by us to be in conflict with *Boston Terminal Co.* v. *Gill,* 246 Fed. 664. In the latter case the United States Circuit Court of Appeals for the First Circuit affirmed and upheld a decision of the United States District Court that the Boston Terminal

Company is a corporation organized for profit and engaged in the business of owning and operating its terminal in Boston for profit so as to render it liable for an excise tax of the United States. The corporation insisted that it was not so organized or engaged in business and that the business conducted on its property was that of the individual railroads using its property under Chapter 516, Laws of Mass., 1896. (Ex. 16, R. 616.) In the instant case the New Haven admits in its reply that the Boston Terminal Company owns and operates the Boston Terminal property. (R. 429.) Notwithstanding this admission, the Court of Appeals finds in its opinion that "the Terminal Corporation as such, assumed no liability either in construction, maintenance, operation, or otherwise," and that the Court would therefore look "through the corporate shell of the Terminal Company" to see "the real owners, the railway companies" (R. 648), and it held that the rights of the New Haven to be valued were "the ownership and perpetual right of use" in the terminal property. We, therefore, read the opinion of the Court of Appeals herein as in direct conflict with the opinion of the Circuit Court of Appeals.

These decisions, conflicting as we read them, evidence the general importance of the matter under consideration.

B

The question of the duty of the Commission in respect to reporting a single-sum value and its refusal to specifically value trackage rights involves the construction of an important statute of the United States which has not been but should be settled by this Court

(1) We read the decision of this Court in *Kansas City So. Ry.* v. *Int. Com. Comm.*, 252 U. S. 178, held to be decisive by the Court of Appeals, as inapplicable

The New Haven's petition seeks a writ of mandamus to compel the Commission to perform its alleged ministerial duty under Sec. 19a. The issue in such an action against the Commission "is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial." (*Kansas City So. Ry.* v. *Int. Com. Comm.*, 252 U. S. 178, 187.)

That case arose out of paragraph Second of Sec. 19a, which, as originally enacted, required the Commission to find and report in respect to lands, *inter alia*, "separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value." These words were repealed by Act of June 7, 1922 (42 Stat. 624). Prior to the repeal the Commission, relying on the impossibility of making a rational determination in a matter so inherently speculative, and notwithstanding the plain language of the statute, in its valuation of the Kansas City Southern Railway Company, held that it could not determine such excess costs and refused to hear proof concerning the same.

An action for mandamus was instituted by the railway company and the case eventually reached this Court. Examining the face of the statute and the inaction of the Commission, this Court directed the issuance of a writ of mandamus to compel the Commission to perform its plain ministerial duty to hear the proof and to act upon it.

In our opinion, the absence of any such explicit and specific language in Sec. 19a in respect to "trackage rights" distinguishes and renders inapplicable the decision of this Court in *Kansas City So. Ry.* v. *Int. Com. Comm., supra.*

It is true that the Act contains the general and indefinite direction to value "all the property owned or used by every common carrier" limited by the phrase "as hereinafter provided." These words do not *explicitly* instruct the Commission how to treat property in which "trackage rights" exist and no language in the remainder of the Act directs the Commission to find or report a value for "trackage rights." The ambiguity of the statute in this respect required the Commission to interpret its duty thereunder in the light of the intent of the Congress. In finding that an arrangement between carriers for trackage rights creates no additional *property* as that term is used in the Act, the Commission was properly acting within its administrative discretion.

The questions here presented are, therefore, not settled by the decision of this Court in *Kansas City*

So. Ry. v. *Int. Com. Comm., supra,* but should be settled in this case upon an examination of the whole of Sec. 19a to determine whether the indefinite and general words "all the property owned or used" therein so explicitly require the Commission to ascertain and report a value for "trackage rights" as to leave the Commission without discretion to determine that a carrier's "trackage rights" do not constitute "property owned or used" within the intent of the statute.

(2) A final valuation report under Sec. 19a, being only prima facie evidence of value and there being a complete remedy for correction of errors therein when such report is used in evidence, may not, prior to its use, be subjected to court review for erroneous conclusions, either by mandamus or by proceedings in equity

The Los Angeles & Salt Lake R. R. Company brought an action to annul an order of the Commission determining the final value of the carrier's property under Sec. 19a of the Act. It alleged various errors committed, including the omission of property and the erroneous finding of a value for rate-making purposes. The District Court, after hearing the evidence in support of the alleged errors, issued an order annulling the final valuation. *Los Angeles & Salt Lake R. R.* v. *United States,* 4 Fed. (2d) 736; 8 Fed. (2d) 747. On appeal this Court declined to consider whether the charges made in the bill were well founded and ordered it dismissed. *United States* v. *Los Angeles R. R.,* 273 U. S. 299.

It pointed out that final valuations were made by the Commission in the "exercise solely of the function of investigation," and operated to deprive the carrier of no property or right. It observed that conceivably errors may occur in each of the 1,800 valuations to be made which would never be of legal significance unless the valuations were used as evidence in some proceeding before the Commission or a court, and it concluded (p. 312):

> Congress has provided adequate remedies for the correction of errors in the final valuation and the classification thereof. The conclusions reached by the Commission must be submitted first in the form of a tentative report, §19a, pars. (f) and (h). When so submitted, the carrier is authorized to file a protest and to be heard thereon, par. (i). * * * When the final report is introduced in evidence the opportunity to contest the correctness of the findings therein made is fully preserved to the carrier; and any error therein may be corrected at the trial. Specific findings may be excluded because of errors committed in making them.

It therefore held (pp. 311, 314):

> * * * Congress did not confer upon the courts power either to direct what this tribunal * * * shall find, or to annul the report, because of errors committed in making it.
>
> * * * * *

Its conclusions, if erroneous in law, may be disregarded.

It is submitted that the New Haven's allegations herein, if well founded, relate to errors such as may be corrected when and if the valuation is used in evidence, and that prior to such use they are not properly to be corrected either by mandamus or proceeding in equity.

C

The decision of the Court of Appeals in respect of the nature of the New Haven's rights rests upon an erroneous construction of the applicable decision of this Court in *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564

The introduction to the contract of 1848 (Ex. 7, R. 520) states its subject matter. The words "This Agreement and Contract of Transportation," when taken in conjunction with the grant, which is of "the right to run their trains, engines, and cars * * * over the track * * * into the city of New York," determines the contract to be one for "trackage rights."

Such "Contracts of Transportation" or trackage agreements, conveying no franchise and no part of the property but granting "trackage rights," are commonly made between railroad companies. (*Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.* 163 U. S. 564, 584.)

That case arose out of a contract called a lease, by which the Union Pacific let the Rock Island "into full, equal, and joint possession and use of its main and passing tracks, now located and estab-

lished, or which may be hereafter located and established" between certain points. The Union Pacific soon sought to repudiate the "lease" as *ultra vires* under the decision of this Court in *Thomas* v. *West Jersey R. R. Co.,* 101 U. S. 71, and other cases. The Rock Island brought action for specific performance, which was granted. (47 Fed. 15.) This decision was affirmed by the Circuit Court of Appeals (10 U. S. App. 98) and by this Court. The decision of the case depended upon the nature of the contract and the Rock Island's rights thereunder. This Court, speaking through Mr. Chief Justice Fuller, said, at page 582:

> The possession here spoken of was such possession as the Rock Island Company would have when its engines, cars, and trains were running over the tracks. The company had no possession before its trains came on the tracks or after they had run off of them and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them. * * * The contract in this regard was merely an agreement for trackage rights, for running arrangements, a "terminal contract" with compensation on a "mileage" or "wheelage basis," rather than a lease.

The Court of Appeals holds that the foregoing decision "has little or no bearing on the issues here presented" (R. 646–647) because, in the language of the Supreme Court in that case, the contract granted merely "trackage rights" and "by the con-

tract the Pacific company parted with no franchise and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes." It further holds that the New Haven owns and uses a "perpetual easement" (R. 643) which, coupled with a franchise, constitutes a "dominant servitude" (R. 643) in the New York terminal approaches, and that it owns and uses a "base fee in the undivided half" (R. 646) of the Grand Central Terminal.

The grant of the contract of 1848 has been in effect continuously and unchanged since March 17, 1848, and the rights and privileges enjoyed thereunder by the New Haven have been designated throughout the intervening years as "trackage rights." The New Haven in its reports to stockholders and in its sworn annual reports to the Commission from 1888 to the time of this suit has continuously reported the "rights" in controversy as "trackage rights" described in the annual reports as "no proprietary rights but only the rights of a licensee." (Ex. 20, R. 636; see also Exs. 17–22, R. 631–637.) We therefore read the decision of the Court of Appeals as in effect making for the parties a new contract.

Where a written contract between parties is plain and has been so understood and acted upon the Court may not by construction make a different contract for the parties.

In *Green et al.* v. *Biddle,* 8 Wheat. 1, 89–90, the Court said:

> * * * where the words of a law, treaty or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.

In *Gavinzel* v. *Crump,* 22 Wall. 308, the Court said:

> and the court can not, without evidence authorizing it to be done, import words into the contract which would make it materially different in a vital particular from what it now is.

In *Harrison* v. *Fortlage,* 161 U. S. 57, 63, the Court said:

> The court is not at liberty either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of.

In *Green County, Kentucky* v. *Quinlan,* 211 U. S. 582, 596, the Court said:

> But courts can not make for the parties better agreements than they themselves have been satisfied to make.

The opinion of the Supreme Court of the District of Columbia in respect of the nature of the "rights" was based upon the decision of this court in *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co., supra.* Chief Justice Wheat, saying the applicable principle is stated in that case (R. 442) concluded (R. 445):

> The same reasoning applied to the present case leads, I believe, to the conclusion that the New Haven's rights in the tracks of the Harlem are no different in kind from those which the Rock Island had in the tracks of the Union Pacific Company. The language in the one is no broader than that in the other. The purposes, uses and objects were identical, and, as pointed out, by the Supreme Court, 163 U. S. 584, such contracts are frequently made between railroad companies.

The Court of Appeals, we submit, has erroneously failed to apply this applicable decision of this Court, and has erroneously, in a mandamus proceeding, reviewed and reversed the Commission's classification of the New Haven's rights as "trackage rights," and has so considered and construed the contracts as to remake them.

Wherefore the petitioner respectfully requests that a writ of certiorari be issued to the Court of Appeals of the District of Columbia.

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